IN THE 19TH CIRCUIT COURT OF COLE COUNTY, MISSOURI

MISSOURI DEPARTMENT OF HEALTH AND SENIOR SERVICES, Petitioner/Plaintiff, v. REPRODUCTIVE HEALTH SERVICES OF PLANNED PARENTHOOD OF ST. LOUIS REGION, Respondent/Defendant.	)	Case No. 21AC-CC00110 (consolidated with No. 21AC-CC00111)

JUDGMENT

This matter is before the Court on cross-petitions for judicial review of a determination by the Administrative Hearing Commission to award Respondent/Defendant Reproductive Health Services of Planned Parenthood of the St. Louis Region ("RHS") its reasonable attorney's fees and expenses under §§ 536.085–.087, RSMo. In addition, RHS has filed a Motion for Reasonable Fees and Expenses on April 7, 2022, as it relates to this consolidated judicial-review action. The Court heard argument on the petitions on March 8, 2022. The matter is now ripe for disposition.

STANDARD OF REVIEW

This Court "may modify, reverse or reverse and remand the determination of fees and other expenses if the court finds that the award or failure to make an award of fees and other expenses, or the calculation of the amount of the award, was arbitrary and capricious, was unreasonable, was unsupported by competent and substantial evidence, or was made contrary to law or in excess of the [Commission's] jurisdiction." § 536.087.7, RSMo.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Under § 536.087.1, RSMo, a "party who prevails in an agency proceeding . . . , brought by or against the state, shall be awarded those reasonable fees and expenses incurred by that party in

the . . . agency proceeding, unless the . . . agency finds that the position of the state was substantially justified or that special circumstances make an award unjust."

The Department argues that (1) the Commission erred in finding that RHS was a "party" that "incurred" fees and expenses, (2) its position was substantially justified, and (3) special circumstances make an award unjust. RHS argues that the Commission erred in denying its expenses from the underlying action (while awarding its expenses in this collateral fees action).

A. RHS Is a "Party" Under § 536.085, RSMo

The Department does not dispute that the Commission's finding that RHS met the definition of "party" in § 536.085(2)(b) is supported by competent and substantial evidence. Instead, it argues that the Commission erred in refusing to either (a) aggregate the net worth of RHS and affiliated organizations, including Planned Parenthood of the St. Louis Region and Southwest Missouri ("PPSLR"), based on PPSLR's alleged control of RHS, or (b) pierce RHS's corporate veil and aggregate its net worth with PPSLR. If RHS's net worth is aggregated with PPSLR's, RHS does not dispute that it would not meet the statutory definition of "party."

Aggregation is not permitted under §§ 536.085–.087. The legislature has expressly permitted aggregation under a fees statute that predates the one at issue here. The Missouri Supreme Court has instructed that these two statutes must be construed together. *See Greenbriar Hills Country Club v. Dir. of Revenue*, 47 S.W.3d 346, 351–52 (Mo. banc 2001) (holding that an entity seeking attorney's fees under § 536.087 need not meet the more exacting requirements of § 136.315, which expressly permits subsidiary asset aggregation). Because § 136.315 permits subsidiary asset aggregation and §§ 536.085–.087 does not, the Court must infer the legislature intended to preclude aggregation in §§ 536.085–.087.

But even if aggregation were allowed, the Department has identified no viable theory for aggregation or corporate veil piercing. Under the Equal Access to Justice Act cases the Department cites, federal courts authorize considering the assets of another entity only where there is a "legitimate concern" that the party suing is not the true party in interest, but rather a mere "stand-in." *See United States v. Thouvenot, Wade & Moerschen, Inc.*, 596 F.3d 378, 383 (7th Cir. 2010) ("where the real party in interest, being ineligible by reason of its size or affluence for an award of fees under the Equal Access to Justice Act, finds someone to litigate in its place and pays the stand-in's fees"); *SEC v. Comserv Corp.*, 908 F.2d 1407, 1416 (8th Cir. 1990) (disallowing fees where a co-defendant agreement created "the problem of the 'stand-in' litigant who seeks fees under EAJA" potentially "pass[ing] on [the fees] to an ineligible litigant"); *Louisiana ex rel. Guste v. Lee*, 853 F.2d 1219, 1225 (5th Cir. 1988) (noting that consideration of another entity's assets may be appropriate "[w]hen parties eligible for EAJA fees join parties ineligible for EAJA fees" creating "free-rider problems"). The Department does not claim RHS was a stand-in for PPSLR; indeed, it does not dispute that PPSLR could not have appealed the Department's decision to deny RHS its license renewal application.

The Department's corporate veil-piercing theory fares no better. "Piercing the corporate veil is an equitable doctrine used by the courts to look past the corporate form and impose liability upon owners of the corporation—be they individuals or other corporations—when the owners create or use the corporate form to accomplish a fraud, injustice, or some unlawful purpose." *Blanks v. Fluor Corp.*, 450 S.W.3d 308 (Mo. App. E.D. 2014). Under longstanding corporate law, a court can pierce a corporation's veil when all three of the following are shown:

> 1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and

> 2) Such control must have been used by the corporation to commit fraud *or* wrong, to perpetrate the violation of statutory or *other positive legal duty*, or dishonest and *unjust* act in contravention of plaintiff's legal rights; and
>
> 3) The control and breach of duty must proximately cause the injury or unjust loss complained of.

66, Inc. v. Crestwood Commons Redevelopment Corp., 998 S.W.2d 32, 40 (Mo. banc 1999).

"[M]erely showing that one has absolute control of a corporation does not of itself justify piercing the corporate veil." *Blanks*, 450 S.W.3d at 376. Yet, that is all the Department has arguably shown. It speculates, without any proof whatsoever, that perhaps RHS might be undercapitalized, which would be an "improper purpose" that courts have identified as a basis to pierce a corporation's veil. *See 66, Inc.*, 998 S.W.2d at 40–41. However, even if it were true that PPSLR deliberately undercapitalized RHS, such improper purpose has no bearing on this case. The Department has failed to identify any injury to it, let alone any injury with "respect to the transaction attacked," i.e., an injury from this attorney's fees action. *Id.* at 40. Allowing veil piercing under these circumstances would flip this equitable doctrine on its head: rather than providing a remedy in equity when a plaintiff sues a company that was rendered insolvent or undercapitalized by a controlling company, the Department seeks to employ veil piercing as a shield to its own liability. *Collet v. Am. Nat'l Stores, Inc.*, 708 S.W.2d 273, 287 (Mo. App. E.D. 1986).

The Commission did not err in finding that RHS was a "party" eligible for a fees and expenses award. For these reasons, the Commission also did not err in refusing to permit the Department to seek additional discovery on PPSLR's or Planned Parenthood Federation of America's ("PPFA") alleged control of RHS.

B. RHS "Incurred" Fees

The Department next argues RHS did not incur fees because (a) invoices from Stinson LLP

were sent to and paid by PPSLR, and (b) PPFA attorneys worked on the underlying action pro bono.

"[F]ees are incurred when there is a legal obligation to pay them." *S.E.C. v. Comserv Corp.*, 908 F.2d 1407, 1414 (8th Cir. 1990). As the Department emphasized in its briefing, RHS has a management agreement with PPSLR, which provides that PPSLR operates as RHS's payment processor and pays any invoices directed to RHS. RHS, in turn, reimburses PPSLR for those payments and pays PPSLR for its management services. Because RHS had legal obligation to pay its legal fees, RHS incurred the fees invoiced by Stinson LLP.

The Department next contends a prevailing party cannot obtain an award for pro bono counsel, despite "virtual unanimity" among the federal courts allowing such awards. *Cornella v. Schweiker*, 728 F.2d 978, 987 (8th Cir. 1984). Missouri courts, too, authorize awards for pro bono counsel. *Ostermeier v. Prime Properties Invs. Inc.*, 589 S.W.3d 1, 9 (Mo. App. W.D. 2019) (award for pro bono Stinson LLP lawyers). The Department offers no convincing argument why pro bono awards are not allowed.

The Commission did not err in finding that RHS incurred legal fees.

C. Substantial Justification

To escape a fee award, an agency's position must be "substantially justified," which means it had "a reasonable basis in both law and fact for its action." *M.F. by Fields v. Stringer*, 617 S.W.3d 868, 876 (Mo. App. E.D. 2021) (citing *Greenbriar Hills*, 47 S.W.3d at 354). "An agency's action must be *clearly* reasonable not just marginally reasonable." *Id.* at 876 (quoting *Baker v. Dept. of Mental Health*, 408 S.W.3d 228, 232 (Mo. App. W.D. 2013)). The burden of demonstrating a reasonable basis for agency action rests with the agency. *Baker*, 408 S.W.3d at 233.

Under the guise of "substantial justification," the Department attempts to convert this fees action into a "second major litigation." *Dishman v. Joseph* ("*Dishman I*"), 14 S.W.3d 709, 718 (Mo. App. W.D. 2000). But a party against whom fees are sought under § 536.087 is "not free to use the attorney's fee hearing as a forum to relitigate the fact issues it had previously litigated and lost." *Id.*; *see also Stringer*, 617 S.W.3d at 876 ("[A] hearing on the application for attorney's fees and costs is not to be treated as a motion for reconsideration or to relitigate the factual issues the agency previously litigated and lost.").

Here, the Department seeks to relitigate every issue on which it lost. The Department elected not to seek judicial review of the underlying licensure decision, so the Commission's findings and conclusions became final. In any event, it points to record evidence supportive of its position, but fails to demonstrate the Commission's findings were wholly unsupported. But even where the record below "contain[s] evidence from which the [agency] *could have* made . . . determinations favorable to [the losing party]," the facts the Commission previously found "became final" and are not subject to re-litigation. *Dishman I*, 14 S.W.3d at 718. This is the case especially where the Commission heard testimony and made credibility findings. *Id.*

The Commission found that the Department had four reasonable arguments: three related to documentation issues and one involving patient care. But these arguments did not justify denying RHS's license.

The Department contends that each, individually and together, supplied it with a substantial justification to deny RHS's license. However, as the Commission noted, the Department denied RHS's license under § 197.220.1, after finding that "there ha[d] been a substantial failure to

comply with the requirements of sections 197.200 to 197.240."[1] The Department does not seriously dispute the Commission's finding that the four reasonable arguments do not amount to a *substantial* failure to comply with applicable laws nor with the finding that these arguments "pale in comparison to the volume and extent of the unreasonable allegations that formed the Department's most serious and admittedly dispositive allegations." Fees Op. 103–04.

The Commission did not err in finding that the Department failed to demonstrate its position was substantially justified.

D. Special Circumstances

The Department argues (a) each of the above arguments is also a special circumstance that makes an award unjust and (b) the award is unjust because the underlying licensure decision became moot, depriving it of an opportunity to seek judicial review.

The special-circumstances exception is meant to operate as a "safety valve" by allowing the government to advance "good faith" novel and "credible extensions and interpretations" of law. *U.S. Dep't of Lab. v. Rapid Robert's Inc.*, 130 F.3d 345, 347 (8th Cir. 1997). A special circumstance involves "very unusual circumstances." *Trs. of Clayton Terrace Subdivision v. 6 Clayton Terrace, LLC*, 585 S.W.3d 269, 285 (Mo. banc 2019) (citation omitted); *see also Henry v. Farmers Ins. Co.*, 444 S.W.3d 471, 478 (Mo. App. W.D 2014) ("The special circumstances exception, however, is narrow and must be construed strictly." (internal quotation marks and citation omitted)).

For the reasons outlined above, none of these arguments is a special circumstance that would make an award unjust. As for mootness, even if the underlying decision had become moot,

[1] In the Department's reply brief, the Department raises other statutory bases to take action against a licensee, but as the denial decision shows, it did not rely on any basis other than § 197.220, RSMo, when it denied RHS's application.

any mootness was not caused by RHS. *Cf. Lippman v. Bridgecrest Ests. I Unit Owners Ass'n, Inc.*, 4 S.W.3d 596, 598 (Mo. App. E.D. 1999) (construing special circumstances to be "extremely narrow and applied only in unusual circumstances and then only upon a strong showing by the party asserting it," such as a "showing of outrageous or inexcusable conduct by plaintiffs (or plaintiffs' counsel) during the litigation of the case" (internal quotation marks and citation omitted)). Further, it is likely the decision did not become moot, and even if it did, a court would have likely found an exception to mootness. That is because, as the Department emphasizes, under its regulations, the Department cannot renew a license without assuring itself an abortion facility is in complete compliance with all applicable laws. 19 CSR 30-30.050(2)(I). But the Department renewed RHS's license, rather than seeking judicial review. By renewing RHS's license, the Department "determined that [RHS was] in compliance with all requirements of applicable regulations and statutes." 19 CSR 30-30.050(2)(I). The Department thus acquiesced in the Commission's decision.

The Commission did not err in finding there were no special circumstances that made an award unjust.

E. RHS's Expenses

RHS seeks review of the Commission's decision denying its expenses in the underlying action. The Commission denied RHS its expenses in the underlying action, reasoning that RHS failed to show its expenses were "based upon prevailing market rates for the kind and quality of the services furnished." § 536.085(4). Despite this, the Commission awarded RHS its expense in this fees action. This inconsistency alone demonstrates that the Commission's decision was arbitrary and capricious in this respect.

The Commission also erred as a matter of law. The statute provides:

> The amount of *fees* awarded as reasonable fees and expenses shall be based upon prevailing market rates for the kind and quality of the services furnished, except that no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the state in the type of civil action or agency proceeding, and attorney fees shall not be awarded in excess of seventy-five dollars per hour unless the court determines that a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee

§ 536.085(4), RSMo (emphasis added). As the language makes plain, the *fees* portion of a "reasonable fees and expenses" award must be based on the prevailing market rate. Indeed, the following two provisos—pertaining to expert witness compensation and attorney fees—confirm the market-rate qualification relates to fees for professional services, but not for expenses. The only limitation on expenses is that they be "reasonable." However, the Commission did not make any finding related to the reasonableness of RHS's expenses. Accordingly, on remand, the Commission must make such finding, and award RHS its expenses for all that are reasonable.

F. Fees on Review

On April 7, RHS filed a motion for its reasonable fees and expenses incurred in this judicial-review action. A party who prevails in a judicial-review action is entitled to its reasonable attorney's fees and expenses. § 536.087.2, .4, RSMo. RHS's motion was accompanied by affidavits from RHS's attorneys, documenting the time devoted to this action and the payment of a pro hac vice expense. Having considered the submitted affidavits and reviewed the work narratives submitted by RHS's counsel, the Court concludes the hours RHS's counsel spent on this matter and the fees counsel charged were both reasonable, considering the value of the relief sought, the nature of the issues raised, and the results obtained.

CONCLUSION

For the foregoing reasons, it is hereby ORDERED, ADJUDGED, and DECREED:

1. The Department's petition for judicial review in 21AC-CC00110 is denied.

2. RHS's petition for judicial review in 21AC-CC00111 is granted, and the Commission's decision with respect to RHS's expenses from the underlying action is vacated. In all other respects, the Commission's decision is affirmed.

3. This matter is remanded to the Commission for a determination whether RHS's expenses were reasonable, and if any were, for entry of a decision awarding RHS its reasonable expenses.

4. The Department is ordered to pay RHS $8,084.75 for the reasonable fees and expenses it incurred in these judicial-review actions.

SO ORDERED this 22nd day of April, 2022.

Jon. E. Beetem, Circuit Judge, Division I